No. 169

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HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT

OF THE

United States

October Term, 1955

TERRY I. BLUE,
Petitioner,

vs.

DOUGLAS McKAY, Secretary of Interior,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To The Honorable, The Chief Justice and The Justices of the Supreme Court of the United States:

Petitioner, Terry I. Blue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia rendered in this cause.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia filed a *per curiam* opinion. It is appended hereto in the Appendix pursuant to Rule 23(a)(i) Revised Rules of the Supreme Court of the United States. Since the "per curiam" opinion specifically approves the opinion of the United States District Court for the District of Columbia, that opinion is also appended hereto in the Appendix.

The opinion of the United States Court of Appeals for the District of Columbia is not yet published in the official reports.

The opinion of the United States District Court for the District of Columbia is to be found in 136 Fed. Supp. 315.

The opinions are printed in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked to review a judgment of the United States Court of Appeals for the District of Columbia under 28 USCA Sec. 1254(1); 62 Stat. 928. The opinion and judgment for which review is sought were dated and entered on April 12, 1956. No rehearing was asked.

QUESTIONS PRESENTED FOR REVIEW

(1) Did patents of the United States issued pursuant to the Treaty of Guadalupe Hidalgo, the Protocol of Queretaro and the Act of March 3, 1851 to confirm titles to agricultural land held under Spanish or Mexican law merely confirm to claimants the title to the agricultural land which they held under Spanish or Mexican law, or did they also constitute a conveyance by the United States of the minerals below the surface of those lands, title to which was vested in the United States by cessation and which minerals were not owned by the grantees under their prior Spanish or Mexican Grants given pursuant to Spanish or Mexican Law?

(2) Is a power to convey real property owned by the United States conferred on officials of the United States by a statute which neither specifically confers nor forbids such a conveyance, but which is completely silent on the subject?

(3) Can officers of the United States who have no authority at all to dispose of Government property, by their conduct, cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act?

(4) Does the U. S. Patent involved herein convey to the grantees a fee simple title as the words are used in English Common Law, or does it merely confirm to them land which they theretofor held under title deduced from their Spanish ancestor Cristoval Dominguez, whose title was based upon a Spanish grant?

(5) Did the Act of March 3, 1851 grant jurisdiction to the commission to do anything more than confirm patents to land? Did it give the commission any jurisdiction to convey minerals under the land that had vested in the United States Government?

TREATIES AND STATUTES INVOLVED

Treaty of Guadalupe Hidalgo of February 2, 1848, 9 Stat. 922.

Protocol of Queretaro dated May 26, 1948 Act to Ascertain and Settle the Private Land Grants of the State of California, March 3, 1851, 9 Stat. 631. Secs. 8, 9, 11, 13 and 15 are particularly involved. They are appended hereto.

The clarifying provision of the Protocol of Queretaro dated March 26, which is particularly involved is appended hereto.

Mineral Leasing Act of February 25, 1920; 41 Stat. 437, 441; 30 USCA 182, 226, secs. 182 to 226.

STATEMENT OF THE CASE

The Mexican War was ended by the Treaty of Guadalupe Hidalgo of February 2, 1848, 9 Stat. 922. This treaty together with its clarifying Protocol of Queretaro (May 26, 1848) provided *inter alia* that "legitimate titles to every description of property personal and real existing in the ceded territories, are those which were legitimate titles under Mexican law in California and New Mexico up to the 13th day of May, 1846, and in Texas up to the 2nd day of March, 1836."

On March 3, 1951, Congress passed the "Act to Ascertain and Settle the Private Land Grants of the State of California", 9 Stat. 631. The Act established a Board of Commissioners to hear all land claims and to decide upon their legality. Appeals to the U. S. District Court and thence to the Supreme Court of the United States were conferred by the Act.

On October 19, 1852 heirs of Cristoval Dominguez filed a claim for the Rancho San Pedro which they claimed to own in fee. On Aug. 16, 1855 the Commissioners filed their opinion wherein they held that Cristoval Dominguez was the owner of the Rancho San Pedro by grant from the Spanish Governor Sola. The opinion closed with the statement: "A decree will be entered in general terms confirming the title of the petitioners to the premises the same as tenants in common in the proportions in which they are respectively entitled under their rights derived from the source above mentioned". (i.e. Cristoval Dominguez's grant from Gov. Sola).

On the same day (Aug. 16, 1855), the Decree of the Commissioners was filed. The significant words were ". . . it is therefore decreed that the same be confirmed to them to hold and possess the same as tenants in common in the respective shares and proportion which they hold in and to the premises hereby confirmed by title deduced from Cristoval Dominguez . . . ".

Appeal was taken to the U. S. District Court and the decision of the Commissioners was affirmed.

Appeal was taken to the Supreme Court of the United States but was later abandoned and the order granting the appeal was vacated.

On December 18, 1857 a patent was issued which recited the proceedings for confirmation, the decree of confirmation of the Commissioners and the affirmance thereof by the final judgment of the District Court of the United States for the Southern District of California and granted the tract of land described to the claimants "in the respective shares, and proportions which they hold in the premises by title deduced from Cristoval Dominguez . . .".

The "title deduced from Cristoval Dominguez" was title to the surface of the land only and did not and could not include minerals under Spanish or Mexican law. By cession, title to the minerals vested in the United States and the minerals became part of the public domain of the United States.[1]

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[1]The Commission under the Act of March 3, 1851 obviously had no jurisdiction to do more than Congress intended. They could only confirm the patents to the surface of the land. They had no authority or jurisdiction to convey the mineral rights below the land which rights belonged to the United States Government.

Construing the patent above referred to as one of confirmation and not of conveyance, Petitioner on Feb. 27, 1937 applied to the United States Land Office for an oil and gas lease on a portion of the premises described in the U. S. Patent aforesaid. On April 2, 1937 the application was rejected on the grounds that the United States did not own the minerals in the premises, they having "passed from the Government by patent".

On rehearing the application was again denied on April 8, 1949.

An application for reconsideration was rejected July 12, 1949.

This action followed on April 16, 1952.

The action was for a declaratory judgment, the purpose of which was to review final action of an administrative agency.

Jurisdiction was urged:

(1) Under the inherent right of the Court to grant mandatory relief,

(2) Under the terms of Sec. 10 of the Administrative Procedure Act (5 USCA, Sec. 1009),

(3) Under the terms of the Federal Declaratory Judgment Act, as amended (28 USCA Secs. 2201, 2202).

In the progress of the action, the type of relief was restricted and only a declaration that the minerals under the land in question belonged to the United States was sought together with the direction to the

Respondent that he reprocess the application for the oil lease on the basis that ownership of the minerals was in the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The United States Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. The issues are as important as the Tidelands cases heard and decided by this Court. The ultimate consequences might well and properly enrich the treasury of the United States.

It is admitted that mineral rights worth many billions of dollars which formerly belonged to Mexico vested in the United States by cession. Some lay beneath ranchos whose surficial rights had vested in private persons by Spanish and Mexican grants prior to cession. Did a United States patent issued as a part of a statutory procedure to confirm to owners in the ceded territory the titles they enjoyed at cession under Mexican law have the effect of conveying in addition thereto the minerals beneath the surface which did not belong to them under Mexican law, but which were a part of the public domain of the United States when the Patent was issued? This question has never been decided by a federal court until this case. A dictum in a case before the Supreme Court of the State of California holds that the patent was a conveyance. (*Moore vs. Snow*, 17 Cal. 199). The question was not before the court in that case. The appeal was from a

judgment arising after demurrer. Fee simple title was not in issue. A construction of a United States Patent and whether it conveyed or confirmed was not in issue. Title to land was not involved. Fee simple title in the plaintiff was stipulated to in writing in an agreed statement of facts. The action was to recover the value of personal property wrongfully converted by a tort-feasor.

This dictum of a State Court is the stated basis for the policy of the Department of Interior in referring the application for an oil lease in this and all similar cases.

It was the stated basis of the argument of the Department of Justice in the briefs submitted in this cause.

It was admitted to be the only case in point in the U. S. District Court's opinion.

The Court of Appeals did not even write an opinion, but chose rather to foreclose the Government's rights, valued at many billions, by a mere *per curiam* observation affirming the judgment below.

A public question of great importance is involved: Shall the people of the United States be deprived of valuable property rights and their oil producing income by a failure of the Courts of the United States to pass upon them? The determination of the rights of the petitioner, will determine those rights of the government to recapture this asset.

The decision holds that a deed of confirmation is a conveyance in defiance of adjudications of the Supreme Court of the United States to the contrary.

The decision holds that power to convey public property is granted to officials by a statute which only provides for a patent of confirmation constituting mere evidence of a decree of confirmation. The decision announces the absurdity that statutory power to convey the public domain is conferred in a statute by the failure to forbid it therein.

(2) The United States Court of Appeals has decided a federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

The decision adds something to the decree confirming title to the owners of patents under a Spanish grant. It adds "mineral rights" worth many millions of dollars, the ownership of which was neither mentioned nor proved in the proceedings and which admittedly did not belong to the claimants at cession.

This violates the doctrine of *Langdeau vs. Hanes*, (21 Wall. 521; 88 U.S. 521; 22 Law Ed. 606) and *Joplin vs. Chacher* (192 U.S. 94; 48 Law Ed. 359) wherein it is held that a patent in a confirmatory proceeding adds nothing to nor takes anything away from the decree of confirmation.

The decision violates the plain wording of the Act of March 3, 1851 by construing a patent of confirmation into a conveyance of title by reading into it the technical wording of English Common Law when the

title to be confirmed stemmed from a Spanish Sovereign and the Statute states that the claim should be construed in so far as they are applicable by "the laws, usages and customs of the government from which the claim was derived . . ." (Act of March 3, 1851, 9 Stat. 631). One of the Justices of the U. S. Court of Appeals persisted during argument in viewing the words of the patent in harmony with the Rule in *Shelley's* case. He should have been concerned with the Royal Ordinances of Spain enacted May 22, 1783, which were promulgated in Mexico in 1784 and which after Mexican independence remained the law of Mexico until 1885. None of this Spanish and Mexican law appeared to be helpful in arriving at the *per curiam* decision herein sought to be reviewed.

The decision is in conflict with the *Boquillas Land & C. Co. vs. Curtis*, 125 U.S. 339; 53 Law Ed. 822, wherein Mr. Justice Holmes gently, but firmly, exposed the fallacy of the late Justice Field in regarding confirmations and conveyances as identical and restored in the literature of the Supreme Court of the United States the classic distinction between the terms. The decisions for which review is sought did not conflict in "words". The limits of a *per curiam* decision prevented discussion, but the effect is to implement the fallacy and discard the correction.

The decision holds that the words "in fee" in the claim determined the relief granted and hence granted "a fee". This is as absurd as the conduct of a sheriff would be who went forth to collect a tort judgment

and used the sum asked for in the complaint rather than the sum awarded in the judgment to measure the amount he should collect.

The decree of the Commissioners was a legal confirmation. The patent was only documentary evidence thereof. In construing the patent, its purpose and not its technical wording is the legal guide. Deeds absolute on their face have for centuries been construed as mortgages on proof that such was the purpose of the parties.

The purpose here was to confirm previously acquired title under Spanish or Mexican law. As stated by the Supreme Court of the United States in *Henshaw vs. Bissell* (18 Wall 255; 21 Law Ed. 835-8): ". . . the Court is thus compelled to look beyond the patents to the original source of title as it existed under the former government".

(3) The above instances all show that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

The Respondent, over objection, introduced maps showing present development of the property and the Court received it as having a legal effect upon the issue presented. The District Court in its opinion refers to the fact that the property "is in the heart of one of California's richest oil fields and that this suit would gravely interfere with title claims which have been in existence for a long period of time . . ." This

point incited substantial colloquy between the Court and counsel at argument before the United States Court of Appeals.

It is evident therefrom that both courts below were affected by considerations of political policy rather than exclusively applying existing law to the case at hand.

It is for the Congress and not the Courts to establish political policy. The late Justice Holmes, in explaining his concept of his Judicial Duty, began with the proposition that he was not God. A like humility is urged on all Judges when sentimental and emotional urges to enter the alien field of political policy weigh heavily on their judicial consciences and impel them to use judicial power to effect political purposes.

Implicit in the contention of the Respondent and in the utterances of both Courts below is the decision to go outside of the case, the law and the judicial process to settle a political question as they believe it ought to be settled.

This is an abrupt departure from a recent decision of this Court: *U. S. vs. California*, 332 U.S. 19, 91 Law Ed. 1889. In that case two sovereigns confronted each other. Title to minerals beneath land claimed by the State of California was at stake. The land had been in open, notorious possession of the State of California for nearly a century under claim of title. Numerous cases had been decided, based upon the maxim that ownership of land beneath the navigable waters of a State was in the State. Harbors, lighthouses, channels,

docks and wharves had all been constructed on such land under a claim of title by the State, to which United States officials had acquiesced for nearly a century. The United States Government had even purchased portions thereof from the several States.

It was most seriously urged by the Attorney General of California that questions of policy, laches, estoppel, and acquiescence should prevail to maintain the "status quo".

The Supreme Court disregarded such claims in the following words on Page 100, Law Ed.:

> "And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interest here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.
>
> . . . . . .
>
> But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustice to states, their subdivisions, or persons acting pursuant to their permission. See *United States v.*

Texas, 162 U.S. 1, 89, 90, 40 L.ed. 827, 902, 903, 16 S. Ct. 725; *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32, 62 L.ed. 128, 134, 38 S. Ct. 21."

A solemn acquiescence in that decision of the Supreme Court is respectfully urged and the opposite doctrine inherent in this case disapproved. The Judicial Process is not a process designed to set policy. While courts do "legislate interstitially", as Holmes remarked, or "fill in the gaps", as Cardoza puts it, they do not lawfully legislate in the grand manner, and do not legally ignore the positive provisions of Statutory Law. Such actions, if performed, are not judicial actions, nor does the court in performing them exercise a judicial power. They constitute examples of usurpation only, and are performed in defiance of well known institutions of the law.

COMMISSION'S LACK OF JURISDICTION TO GIVE AWAY U. S. GOVERNMENT'S OWNED MINERAL RIGHTS.

It will be noted from the pertinent sections of the Act of March 3, 1851 quoted in the appendix that Congress did not give the land commissioners any authority or jurisdiction to convey anything. At that time the title to all the minerals beneath the surface had vested in the United States, and that Commission was powerless to convey this vested property under any doctrine of settling private land claims. Those rights could only be conveyed by the Congress of the United States, or by authority it might give to the Secretary of the Interior. None were ever given. That property has remained and is still in the United States Government, and petitioner is entitled to a declaration to that effect.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,903

TERRY I. BLUE, Appellant

v.

DOUGLAS McKAY, Secretary of the Interior, Appellee.

Appeal from the United States District Court for the District of Columbia

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Decided April 12, 1956

Mr. Welburn Mayock for appellant.

Mr. S. Billingsley Hill, Attorney, Department of Justice, with whom *Mr. Perry W. Morton*, Assistant Attorney General, was on the brief, for appellee. *Mr. Roger P. Marquis*, Attorney, Department of Justice, also entered an appearance for appellee.

Mr. Robert M. Vaughan filed a brief on behalf of California Land Title Association, as *amicus curiae*, urging affirmance.

Before Prettyman, Fahy and Bastian, Circuit Judges.

PER CURIAM: Plaintiff (appellant) filed this proceeding praying for a judgment declaring that the United States is rightfully the owner of and has accepted ownership by treaty and grant from the Republic of Mexico, of the minerals under certain lands in California ceded by the Treaty of Guadalupe Hidalgo, and that the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 30 U.S.C. 182 as amended, be declared applicable to the right to develop the minerals under said grant. Plaintiff further prayed that a mandatory injunction or order be issued directing the defendant (appellee), Secretary of the Interior, and his agent or representative, to reprocess plaintiff's application for an oil and gas lease filed pursuant to the said Mineral Leasing Act and, as of the date of said application, to grant plaintiff's application for an oil and gas lease. From an adverse judgment, after final hearing, plaintiff appeals.

The opinion of Judge McGarraghy in the District Court, 136 F. Supp. 315 (D.C.Cir. 1955), in our judgment, correctly disposes of the case.

The judgment of the District Court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1691-52

TERRY I. BLUE,)
Plaintiff,)
vs.)
DOUGLAS McKAY,)
Secretary of the Interior,)
Defendant.)

MEMORANDUM

This is a proceeding for a judgment declaring (1) that the United States is rightfully the owner of and has accepted ownership by treaty and grant from the Republic of Mexico of the minerals in certain lands in California ceded by the Treaty of Guadalupe Hidalgo and later patented by the United States to parties who claimed title under a prior Mexican grant; (2) that the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 441, 30 U.S.C. 181, 226, is applicable to the right to develop the minerals under the said confirmed Mexican grant; and (3) for a mandatory injunction or order directing the Secretary of Interior to reprocess plaintiff's application for an oil and gas lease filed pursuant to the Mineral Leasing Act and to grant the plaintiff's application for such lease.

The defendant, while contending that the plaintiff could not obtain a decree directing issuance of an oil and gas lease since this involves a discretionary func-

tion of the Secretary of Interior, raised no objection to the Court's review of the Secretary's legal conclusion that title to the minerals passed with the patent, nor does the defendant claim that the owners of the surface rights are necessary parties to this proceeding.

By the Treaty of Guadalupe Hildalgo of February 2, 1848, 9 Stat. 922, the Mexican war was brought to a close and, among other things, a large territory including all of the present State of California was ceded to the United States. Among other provisions, the Treaty provided for the protection of property in the ceded territories which was then held by many individuals under prior grants from Mexico and Spain.

The Protocol of Queretaro dated May 26, 1848, contained the following clarifying provision:

> "The American Government by suppressing the Xth Article of the Treaty of Guadalupe did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.
>
> "Conformably to the law of the United States, legitimate titles to every description of property personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th day of May, 1846 and in Texas up to the 2nd day of March 1836."

In order to establish the validity and the boundaries of the private claims and to set apart the lands privately owned from those which would thereafter be owned by the United States, Congress passed the Act of March 3, 1851, 9 Stat. 631, entitled "An Act to Ascertain and Settle the Private Land Grants of the State of California".

The Act established a Board of Commissioners to hear all land claims with provision for appeal to the District Court and to the Supreme Court of the United States.

Sec. 8 of the Act provided that claimants should present their claims to the Commissioners when sitting as a Board and thereafter the Commission should "proceed promptly to examine the same upon such evidence and upon the evidence produced on behalf of the United States and to decide upon the validity of said claim" and thereafter, within thirty days from the date of the decision, to certify the same, with the reasons on which it was founded, to the District Attorney of the United States in and for the District for which the decision was rendered.

Sec. 9 provided for a court review in the District Court of the United States and an appeal to the United States Supreme Court.

Sec. 11 provided that the Commissioners and the District Court and Supreme Court in passing upon the validity of any claim "shall be governed by the Treaty of Guadalupe Hidalgo, the law of the Nations, the laws, usages and customs of the government from

which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

Sec. 13 of the Act, after providing that all lands, the claims to which have been finally rejected by the Commissioners or which are finally decided to be invalid by the courts, and all lands the claims to which shall not have been presented to the Commissioners within two years from the date of the Act, shall be deemed held and considered as part of the public domain of the United States, further provided that "for all claims finally confirmed by the said Commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the Surveyor General of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same . . ."

Sec. 15 of the Act provided that "any patent to be issued under this Act shall be conclusive between the United States and the said claimants only and shall not affect the interests of third persons."

On October 19, 1852, various heirs of Christobel Dominguez presented a petition to the Board of Commissioners appointed under the above Act claiming "in fee simple a certain tract of land situate in the county of Los Angeles, known by the name of 'San Pedro' containing ten square leagues, more or less."

The claim went on to state that the claimants "claim said tract of land, a portion of them by inheritance from, and a portion by purchase from, the heirs of Christobel Dominguez who died seized in fee thereof and who inherited from his uncle, Juan Jose Dominguez, who died also seized therefor in fee somewhere about the year 1809-10."

After reciting the chain of title and their relationship to Christobel Dominguez, the petition stated "and your petitioners therefore aver they claim in fee the said Rancho of San Pedro as tenants in common in the shares and proportions as aforesaid in virtue of the aforesaid grants, of their long and specific possession and of the satisfaction, approval and acknowledgment of their title by the Mexican Government."

The petition prayed "the Honorable Board to take their said claim into consideration and to declare their title to the said Rancho San Pedro good and valid, and to confirm the same, and as in duty bound, etc., etc. . . ."

Thereafter, the Board of Commissioners sustained the claim of the petitioners and, in an opinion reciting the evidence in support of the claim, the Board held that the case "falls within the rules and as such is entitled to a confirmation", and "a decree will be entered in general terms confirming the title of the petitioners to the premises to hold the same as tenants in common in the proportion in which they are respectively entitled under the rights derived from the sources above mentioned."

A decree of confirmation was entered on October 17, 1854.

From the decision of the Board of Commissioners, an appeal was prosecuted by the Government to the District Court of the United States for the Southern District of California, which Court on the 10th day of February, 1857 entered its judgment affirming the decision of the Board of Land Commissioners. The judgment adjudged and decreed "that the claims of the appellees to the land claimed in this case is good and valid and the same are hereby confirmed in them as follows: the lands of which confirmation is hereby made are known as the 'Rancho San Pedro' situate in Los Angeles County and bounded as follows: . . . (Description follows)."

An appeal was taken from the decision of the District Court to the Supreme Court of the United States but was subsequently withdrawn. Thereafter, the survey was approved by the U. S. Surveyor General and a patent was issued on December 18, 1858.

After reciting the various procedural steps taken under the Act of March 3, 1851, including quotation of the complete survey authenticated by the U. S. Surveyor General, California, the patent concluded with the following grant:

> "Now Know Ye, That the United States of America, in consideration of the premises, and pursuant to the provisions of the Act of Congress aforesaid of 3rd March 1851, Have Given and Granted, and by these Presents do Give and Grant,

unto the said Manuel Dominguez, Concepcion Roche, Bernardino Rocha, Jose Antonio Aguina, Maria Jesus Cota de Dominguez, Madalina Dominguez, Andres Dominguez, Feliciana Dominguez, Estebane Dominguez, Maria Dominguez, Pedro Dominguez, Jose Dominguez, Maria, widow of Manuel Rocha, and Antonio Jacinto Rocha, and to their heirs, the tract of land embraced and described in the foregoing survey, 'in the respective shares and proportions which they hold in the premises,' 'by title deduced from Christobel Dominguez, deceased, by heirship or by mesne conveyances'; but with the stipulation that in virtue of the 15th Section of the said Act, the confirmation of this said claim, and this patent, 'shall not affect the interests of third persons;'

"To Have and To Hold the said tract, with the appurtenances, in the respective shares and proportion, and with the stipulation aforesaid, unto the said Manuel Dominguez, Concepcion Rocha, Bernardino Rocha, Jose Antonio Aguina, Marie Jesus Cota de Dominguez, Madalina Dominguez, Andres Dominguez, Feliciana Dominguez, Estenban Dominguez, Maria Dominguez, Pedro Dominguez, Jose Dominguez, Maria, widow of Manuel Rocha, and Antonio Jacinto Rocha, and to their heirs and assigns forever."

From the date the patent was issued in 1858 until the present time, the United States has not asserted claim to any mineral interest in the land described in the patent. Apparently the area has been used and developed on the theory that the patentees obtained a full fee title. An exhibit offered in evidence by the

defendant indicates that this particular area is in the heart of one of California's richest oil producing fields.

On February 27, 1937, the plaintiff applied to the United States Land Office in Los Angeles for an oil and gas lease on some of the lands included in the Dominguez (or San Pedro) patent described as Sec. 4, Township 5 South, Range 13 West Los Angeles County. This application was rejected on April 2, 1937 by the Commissioner of the General Land Office on the ground that the land was "embraced in confirmed private land claims title to which has long since passed from the Government by patent. The Department has no jurisdiction over such lands and no authority to issue an oil and gas lease covering the same."

A rehearing was granted on May 12, 1937 following which briefs were filed by parties in interest but no decision was rendered for some twelve years. This delay was due primarily to the intervening "off shore oil" litigation. On April 8, 1949, an opinion was issued by the Solicitor of the Department of the Interior acting for the Secretary, denying the rehearing application. An application for reconsideration was filed on July 5, 1949 which was rejected on July 12, 1949. This suit followed on April 16, 1952.

PLAINTIFF'S CONTENTIONS

Plaintiff contends that the United States patent did not convey the minerals beneath the soil in the land described to the patentees for the reason that the Treaty of Guadalupe Hidalgo and the Protocol of Queretaro provided for the confirmation by the United States of legitimate titles under Mexican law in California up to May, 1846; that under Mexican law the ownership of agrarian land did not include the mines or minerals below the surface, but that these belonged to the sovereign; that the claim of Dominguez, et al, which includes the land involved in these proceedings was a claim of title to agricultural land and did not constitute a claim to the minerals therein, which under Mexican law belonged to the sovereign; that the Act of March 3, 1851 provided only for confirmation of existing titles to property under Mexican law and did not include the power to convey to a claimant out of the Public Domain of the United States more property than such claimant owned under Mexican law; that the United States acquired by cession all the rights and property of the Republic of Mexico and California including the minerals beneath the surface of the Dominguez grant, and that since title thereto has never been conveyed but remains in the United States, the plaintiff acquired the right to a lease of the minerals in the land described in his Application of February 26, 1937.

DEFENDANT'S CONTENTIONS

The defendant contends that the patent issued under the Act of March 3, 1951 and the proceedings which were held incident to the issuance of said patent carried with it title to the oil, gas and minerals and that the United States does not own any interest in the land described in plaintiff's application which could properly be the subject of a Federal oil and gas lease; that since the patent was issued the United States has made no attempt to claim any mineral interest in the land described and the area has been used and developed on the theory that the patentee obtained a full fee title; that this particular area is in the heart of one of California's richest producing oil fields and that this suit would gravely interfere with title claims which have been in existence for a long period of time; also, that as against the United States, or those claiming under it, a patent under the 1851 Act operates as a quit claim, and that one holding a patent under the 1851 Act has uniformly been held to have a conclusive title against the United States or anyone tracing his claim to the United States; that the legislative history of the 1851 Act confirms the conclusion that patents issued thereunder conveyed the minerals; and that while there have been no earlier Interior Department decisions on the precise subject, there seems to be no question that the defendant's predecessors in title have consistently concluded that the United States did not own the minerals and lands patented under the 1851 Act; that earlier Secretaries of the Interior at no time have suggested that action should be taken to assert a

claim of title to these minerals and, therefore, this case is subject to the rule that courts should regard long continued and uniform practice of the officers charged with the duty of administering the law as persuasively determinative of its construction.

OPINION

The question to be decided in this case is whether or not the patent dated December 18, 1858 to Manuel Dominguez, et al, and issued pursuant to the provisions of the Act of March 3, 1851, conveyed title to the minerals beneath the soil in the land described in the patent.

It seems clear that, as plaintiff contends, under Spanish and Mexican law, no interest in the minerals passed by grant from the Mexican Government of the land in which they were contained, without express words designating them. *The United States vs. Andres Castillero*, 2 Black 17; *Moore vs. Smaw*, 17 Cal. 199. In view of this fact, it may be argued in support of the plaintiff's position that, since the claim of Dominguez, et al, was a claim of title to agricultural lands and did not constitute a claim to the minerals therein, the patent issued pursuant to the provisions of the Act of March 3, 1851 only confirmed the title of the claimants to the agricultural land and did not convey title to the mines or minerals below the surface.

However, such a ruling would run counter to a long line of authorities which either directly or indirectly support a contrary view and would do violence to the

purpose of the Act of March 3, 1851, to settle private land claims in the State of California based on Mexican and Spanish grants and not to leave such titles in their former indefinite position.

The contentions made by the plaintiff in this suit were raised as long ago as 1861, and decided adversely to the position here taken by the plaintiff, in the case of *Moore vs. Smaw*, 17 Cal. 199, written by Chief Justice Field of that Court, later Mr. Justice Field of the Supreme Court of the United States, in which the Court held that consistent with the purposes of the Act of March 3, 1851, the effect of a patent under said Act was to divest the United States of any and all interest in the land, including the minerals which it may have acquired from Mexico under the Treaty.

While the precise issue raised in this pending suit appears not to have been raised in any prior litigation in any Federal Court so as to be directly passed upon, the *Moore* decision has never been questioned and it has been cited with approval in other cases, although not with respect to the issue involved in this proceeding. *Burke vs. Southern Pacific Railroad*, 234 U.S. 669, 689, *United States vs. Texas*, 339 U.S. 706, 709.

The Dominguez claim was the subject of an elaborate opinion by the Supreme Court of the United States in *Dominguez De Guyer vs. Banning*, 167 U.S. 723, written by Mr. Justice Harlan, in which the history of the claim is recited in detail and, while the Court in that case did not have before it the issue now under consideration, it did hold that the description in the

patent controlled and from this holding it is reasonable to conclude that the patent issued on December 18, 1858 embraced all of the land, including the minerals under the surface, to the patentees therein named.

In the case of *Beard vs. Federy*, 3 Wall. 478, the Supreme Court held that a patent issued pursuant to the provisions of the Act of March 3, 1851 is "a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the Board of Land Commissioners."

In *Fremont vs. United States*, 17 How. 542, the Court also had the Act of March 3, 1851 under consideration and pointed out that the Eighth Section of the Act "embraces not only inchoate or equitable titles, but legal titles also; and requires them all to undergo examination and to be passed upon by the Court. The object of this provision appears to be, to place the titles in land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of the country, in a manner and form that will prevent future controversy."

In *Interstate Land Co. vs. Maxwell Land Co.*, 139 U.S. 569, the Supreme Court again had before it the question of the effect of a patent covering land acquired from Mexico by the Treaty of Guadalupe Hidalgo, and the Court said (page 580)

> "The confirmation and patenting of the grant to Beaubien and Miranda operated to divest the United States of all their rights to the land em-

braced in the grant which this country acquired from Mexico by the Treaty of Guadalupe Hidalgo. And the only way that that grant can be defeated now is to show that the lands embraced in it had been previously granted by the Mexican Government to some other person."

In *United States vs. O'Donnell*, 303 U.S. 501, 512, in which the history of the Act of March 3, 1851 is set out in detail, the Court said:

"The primary purpose of the Mexican Claims Act was the performance by the United States of its treaty obligations to quiet the titles of the claimants under Spanish and Mexican grants. But a necessary consequence of proceeding before the Commission, and one incidental to the determination of the validity of the titles of such claimants, was a determination whether, by the cession, the lands in question had become a part of the public domain of the United States. It is evident that the treaty obligations to quiet the title of claimants under the Mexican grants would be defeated and the Mexican Claims Act would fail of its purpose if the finality of the Board's confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States. For that reason it has been consistently held that claimants under the United States, by virtue of statutes disposing of its public lands in California, are not 'third persons' within the meaning of the Mexican Claims Act, and that confirmation under that Act of claims under Mexican grants is conclusive upon all those claiming under the United States."

In *Adam vs. Norris*, 103 U.S. 591, 593, the Court said:

> "But the United States, in dealing with parties claiming, under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a quit claim,—an admission that the rightful ownership had never been in the United States, but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this Court. (Citing cases.)"

In the case of *Ely Real Estate & Investment Company vs. Watts, et al.*, 262 F. 721, which related to the Gadsden Treaty with Mexico of December 30, 1853, under which the United States acquired that portion of Arizona involved in the proceeding, required consideration of the Treaty of Guadalupe Hidalgo and the Court dicussed at length the provisions of the Act of March 3, 1851, particularly Sec. 15 thereof. In the opinion written by Circuit Judge Gilbert, after reviewing a number of authorities, the Court said:

> "It has been held in numerous decisions that the patent issued upon a confirmed Mexican grant is to be regarded in two aspects: First, it is a quit claim deed from the United States, which takes effect by relation at the time when proceedings

were instituted by the filing of the petition with the Commission or Court created to adjudicate the claim; Second, it is a record of the Government, showing its judgment with respect to the title of the patentee at the date of the cession." (Citing cases.)"

Other authorities which, while not directly in point, lend support to the conclusions herein expressed, are *Botiller vs. Dominguez*, 130 U.S. 238; *United States vs. San Jacinto Tin Co.*, 125 U.S. 273; *United States vs. Coronado Beach Co.*, 255 U.S. 472; *Work vs. Mason*, 6 F. (2d) 474; *Hogan vs. United States*, 72 F. (2d) 799; *Los Angeles and Salt Lake Railroad Company vs. United States*, 140 F. (2d) 436; *Leese vs. Clark*, 20 Cal. 388, 423.

The claim filed by the heirs of Christobel Dominguez claimed "in fee simple a certain tract of land situate in the County of Los Angeles, known by the name of 'San Pedro' containing ten square leagues, more or less", and went on to state that Christobel Dominguez "died seized in fee thereof", and then the petitioners "aver they claim in fee the said Rancho San Pedro as tenants in common . . ." The patent issued gave and granted "the tract of land embraced and described in the foregoing survey".

In the light of the foregoing authorities, it is my conclusion that the patent herein described and issued pursuant to the provisions of the Act of March 3, 1851, did convey title to the minerals beneath the soil in the land described in the patent; that the patentees ac-

quired a conclusive title against the United States or anyone tracing his claim to the United States; that the defendant correctly ruled that the United States does not own the minerals in the lands described in the lease application and, therefore, the plaintiff is not entitled to the relief demanded.

Counsel for the defendant will submit an appropriate order in conformity with the foregoing.

/s/ JOSEPH C. McGARRAGHEY
Judge F

June 24, 1955

EXCERPT FROM PROTOCOL OF QUERETARO CLARIFYING TREATY OF GUADALUPE HIDALGO.

The Protocol of Queretaro dated May 26, 1848, contained the following clarifying provision:

> "The American Government by suppressing the Xth Article of the Treaty of Guadalupe did not in any way intend to annul the grants of land made by Mexico in the ceded territories. These grants, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.
>
> "Conformably to the law of the United States, legitimate titles to every description of property personal and real, existing in the ceded territories, are those which were legitimate titles under the

Mexican law in California and New Mexico up to the 13th day of May 1846 and in Texas up to the 2nd day of March 1836."

PERTINENT SECTIONS OF ACT OF MARCH 3, 1851

Sections 1, 8, 9, 10, 11, 13, and 15 of the Act of March 3, 1851, 9 Stat. 631, are as follows:

An Act to ascertain and settle the private Land Claims in the State of California

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of ascertaining and settling private land claims in the State of California a commission shall be, and is hereby, constituted, which shall consist of three commissioners, to be appointed by the President of the United States, by and with the advice and consent of the Senate, which commission shall continue for three years from the date of this act, unless sooner discontinued by the President of the United States.

* * * * *

SEC. 8. *And be it further enacted,* That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready

for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered.

SEC. 9. *And be it further enacted*, That in all cases of the rejection or confirmation of any claim by the board of commissioners, it shall and may be lawful for the claimant or the district attorney, in behalf of the United States, to present a petition to the District Court of the district in which the land claimed is situated, praying the said court to review the decision of the said commissioners, and to decide on the validity of such claim; and such petition, if presented by the claimant, shall set forth fully the nature of the claim and the names of the original and present claimants, and shall contain a deraignment of the claimant's title, together with a transcript of the report of the board of commissioners, and of the documentary evidence and testimony of the witnesses on which it was founded; and such petition, if presented by the district attorney in behalf of the United States, shall be accompanied by a transcript of the report of the board of commissioners, and of the papers and evidence on which it was founded, and shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, a copy of which petition, if the same shall be presented by a claimant, shall be served on the district attorney

of the United States, and, if presented in behalf of the United States, shall be served on the claimant or his attorney; and the party upon whom such service shall be made shall be bound to answer the same within a time to be prescribed by the judge of the District Court; and the answer of the claimant to such petition shall set forth fully the nature of the claim, and the names of the original and present claimants, and shall contain a deraignment of the claimant's title; and the answer of the district attorney in behalf of the United States shall fully and distinctly set forth the grounds on which the said claim is alleged to be invalid, copies of which answers shall be served upon the adverse party thirty days before the meeting of the court, and thereupon, at the first term of the court thereafter, the said case shall stand for trial, unless on cause shown, the same shall be continued by the court.

SEC. 10. *And be it further enacted*, That the District Court shall proceed to render judgment upon the pleadings and evidence in the case, and upon such further evidence as may be taken by order of the said court, and shall, on application of the party against whom judgment is rendered, grant an appeal to the Supreme Court of the United States, on such security for costs in the District and Supreme Court, in case the judgment of the District Court shall be affirmed, as the said court shall prescribe; and if the court shall be satisfied that the party desiring to appeal is unable to give such security, the appeal may be allowed without security.

SEC. 11. *And be it further enacted*, That the

commissioners herein-provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

* * * * *

SEC. 13. *And be it further enacted*, That all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the District or Supreme Court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 169

TERRY I. BLUE, PETITIONER

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1–2) is not yet reported. The opinion of the District Court (Pet. App. 3–19) is reported at 136 F. Supp. 315.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1956 (Pet. App. 1). The petition for a writ of certiorari was filed on June 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Mexico ceded a large territory to the United States in 1848 by the Treaty of Guadalupe Hidalgo. Thereafter, by Act of March 3, 1851, 9 Stat. 631, Congress provided for a board of commissioners "to ascertain and settle" all claims "of any right or title derived from the Spanish or Mexican government" in California and for appellate review by the local federal district court and by this Court. It further provided for a patent by the United States to claimants whose titles were thus settled. Lands as to which claims were not validated became property of the United States. The question presented is as follows:

Whether a decree of the board, affirmed by the district court, confirming a claim to a Rancho (derived from an original Spanish grant) in "fee simple," and a patent by the United States issued in 1858 pursuant to that decree, operated to establish that the United States had no interest in the land, including the minerals.

STATUTE INVOLVED

Relevant portions of the Act of March 3, 1851, 9 Stat. 631, are set out at pp. 20–24 of the Appendix to the petition.

STATEMENT

Petitioner instituted this suit to compel the Secretary of the Interior to grant petitioner's application for an oil and gas lease on certain land in Los Angeles County, California, pursuant to the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 441, 30 U. S. C. 181, 226 (Pet. App. 3). To support the requested

mandatory relief, petitioner seeks a declaratory judgment that the United States owns the minerals in that land, which was ceded by Mexico and later patented by the United States to parties who claimed under a prior Spanish grant (Pet. App. 3). The relevant facts are as follows:

The Mexican war was concluded by the Treaty of Guadalupe Hidalgo on February 2, 1848, 9 Stat. 922. In that treaty a cession was made of a very large territory including all of the present State of California. Under the treaty provisions, the land titles of individuals within the ceded territory were protected. Land owned by the Mexican government and land as to which no valid private claim could be established belonged to the United States. The number of claimants and the type of Spanish and Mexican grants were many and varied. These facts required some procedure for ascertaining the validity, quantum and boundaries of the private claims in order to set apart the lands privately owned from those which belonged to the United States. To accomplish this, Congress passed the Act of March 3, 1851, 9 Stat. 631, entitled "An act to *ascertain and settle* the private Land Claims in the State of California."[1]

That Act established a board of commissioners "for the purpose of ascertaining and settling" all private land claims, empowered it "to decide upon the validity" of such claims, and provided that the board's findings could be appealed to the district court and thence to this Court. Section 13 provided that in all

[1] Italics added throughout this brief.

of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

* * * * *

SEC. 15. *And be it further enacted,* That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

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instances where claims were rejected by the commission or courts or were not filed within two years the lands "shall be deemed, held, and considered as part of the public domain of the United States." It further provided that "for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land * * *." Section 15 provided that "any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

Pursuant to that Act, several heirs and purchasers from heirs of one Christobel Dominguez presented to the commissioners in the year 1852 a "claim in fee simple" to 10 square leagues of land known as the Rancho of San Pedro (Pet. App. 6, 7). They asserted that Christobel Dominguez and his successors were "seized in fee thereof" under an original Spanish grant which had been ratified by the Mexican government (Pet. App. 7). The commissioners ruled that the claim was valid and entered a decree confirming it (Plaintiff's Exhibit 4). On appeal by the United States, the District Court ruled that "the claim * * * is good and valid" and affirmed the decree of the commissioners on February 10, 1857 (Pet. App. 8).[2] Thereafter, following a survey, a patent of

[2] An appeal taken to this Court was withdrawn on June 4, 1857 (Plaintiff's Exhibit 5).

the United States was issued to the claimants on December 18, 1858, granting the area claimed in the words and form of a common-law fee simple estate (Pet. App. 8–9).

The matter thus rested until petitioner in this action applied, on February 26, 1937, for an oil and gas lease on some of the lands (not exceeding 640 acres) included in the Dominguez patent. This application, along with applications by 26 other persons for leases on similar tracts, was rejected by the Secretary of the Interior on the ground that the land was "embraced in confirmed private land claims, title to which has long since passed from the Government by patent. The Department has no further jurisdiction over these lands, and no authority to issue an oil and gas lease covering the same" (Defendant's Exhibit 1). Following a rehearing, the application was again denied on April 8, 1949, and a request for reconsideration was refused on July 12, 1949.

This suit was filed by petitioner on April 16, 1952 (Pet. App. 10). Following a trial, the District Court entered judgment in favor of the Secretary and dismissed the complaint. The court held that petitioner's contentions "run counter to a long line of authorities which either directly or indirectly support a contrary view and would do violence to the purpose of the Act of March 3, 1851, to settle private land claims in the State of California based on Mexican or Spanish grants and not to leave such titles in their former indefinite position" (Pet. App. 13–14). The Court of Appeals affirmed *per curiam,*

stating that the opinion of the District Court "in our judgment, correctly disposes of the case" (Pet. App. 1–2).

ARGUMENT

The issue presented by this case has long been settled against the petitioner's contentions. He argues that the people of the United States should not "be deprived of valuable property rights and their oil producing income by a failure of the Courts of the United States to pass upon them" (Pet. 9). But the courts of the United States years ago passed upon those rights. The issue thus becomes merely whether petitioner can collaterally attack the judgments of those courts. That issue has also been decided by this Court, adversely to petitioner.

In this case the patentees had repeatedly asserted "that they claim in fee simple" title to the land involved (Pet. App. 6–7; Plaintiff's Exhibit 1), and they asked confirmation of *that* title. They asserted that their fee simple title derived from "both the Spanish and Mexican Governments" (Plaintiff's Exhibit 1). The opinion of the board ordered entry of a decree "in general terms confirming the title of the petitioners" (Pet. App. 7), and a decree adjudging "that the *claim* of said petitioners is valid" was entered (Plaintiff's Exhibit 4). On appeal, the district court took additional evidence, and, thereafter, affirmed the decree of the board, finding "the *claims* of the appellees to the land claimed in this case * * * good and valid" (Pet. App. 8). The patent issued pursuant to the decree was in terms of a fee simple title (Pet. App. 8–9).

Plainly, the proceedings and the decree must be regarded as relating to "the claim asserted." *Brown* v. *Brackett,* 21 Wall. 387. By its patent, issued pursuant to a decree of confirmation, "the government declares that the *claim asserted* was valid under the laws of Mexico * * *." *Beard* v. *Federy,* 3 Wall. 478, 492. In *Thompson* v. *Los Angeles Farming, etc. Co.,* 180 U. S. 72, it was contended that a decree of confirmation under the 1851 Act and the patent issued were utterly void because the papers used to support the claim showed that the Mexican government lacked authority in law to convey mission lands, so that no title could have been "derived from the Spanish or Mexican government." This Court rejected the contention, stating (pp. 77–78):

> They [the provisions of the 1851 Act] made a special tribunal of the board limited to hear a particular class of claims, but not limited to the questions of law and fact which could arise in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the claim—the propositions of law or propositions of fact—the fact of a grant, or the power to grant, was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the District Court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all

> the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. Sec. 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the District Court. Sec. 9. Indeed, the proceedings in the District Court were really new, and further evidence could be taken. Sec. 10. Upon the confirmation of the claim by the commissioners or by the District or Supreme Court, a patent was to issue and be conclusive against the United States. Sec. 15.

Similar expressions of the scope and finality of confirmation proceedings under the 1851 Act appear in many other decisions. *E. g., Botiller* v. *Dominguez*, 130 U. S. 238, 249; *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 487; *Hogan* v. *United States*, 72 F. 2d 799, 804–805 (C. A. 9.).[3] The same rule has been

[3] In *Brown* v. *Brackett*, 21 Wall. 387, 389, this Court said concerning the 1851 Act: "Every conceivable point respecting these grants, their validity, their extent, and the operation of decrees confirming claims to land under them, has been frequently examined; and the law upon these subjects has been repeated even to wearisomeness."

applied in decisions respecting similar provisions in other acts. *Langdeau* v. *Hanes,* 21 Wall. 521; *Interstate Land Co.* v. *Maxwell Land Co.,* 139 U. S. 569, 580; *Joplin* v. *Chachere,* 192 U. S. 94, 104; *Ely Real Estate & Investment Co.* v. *Watts,* 262 Fed. 721 (C. A. 9).

Section 15 of the 1851 Act provided that "the final decrees * * * or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." The effect of that Section in binding such persons as petitioner has long been settled. In *Beard* v. *Federy,* 3 Wall. 478, 493, this Court held that the "term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." And in *United States* v. *O'Donnell,* 303 U. S. 501, 512, the Court stated that "it has been consistently held that claimants under the United States, by virtue of statutes disposing of its public lands in California, are not 'third persons' within the meaning of the Mexican Claims Act, and that confirmation under that act of claims under Mexican grants is conclusive upon all those claiming under the United States." See also *Hogan* v. *United States,* 72 F. 2d 799, 806 (C. A. 9). Thus, in the present case, petitioner, who merely applied in 1937 for an oil and gas lease under the Mineral Leasing Act of 1920, has no superior title, and seeks, at most, to

be a claimant under or in privity with the United States. It follows that Section 15 bars his claim.

The identical contention urged by petitioner here, that title to minerals did not pass under a patent issued pursuant to the 1851 Act, was rejected in 1861 by the Supreme Court of California in *Moore* v. *Smaw,* 17 Cal. 199. Contrary to petitioner's assertions (Pet. 8–9), the ruling as to the effect of the patent was not dictum. The case authoritatively decided that a patent granting a fee simple estate included the minerals. That decision by Chief Justice Field, who later served on this Court, has never been questioned by any court. It has been in force and relied upon for almost 100 years. See also *Delassus* v. *United States,* 9 Pet. 116. "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change." *Minnesota Co.* v. *National Co.,* 3 Wall. 332, 334.[4]

Petitioner's assertion of a conflict with decisions of this Court (Pet. 10–12) is without merit. All the decisions upon which he relies hold that confirmation vests the title claimed to the full extent recited in the decree. Confirmation does not enlarge the original grant, but adjudicates and defines the grant with

[4] Other cases have been decided on the presumption that title to the minerals passed by patents from the United States under the 1851 Act. *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273; *Los Angeles & Salt Lake Railroad Company* v. *United States,* 140 F. 2d 436 (C. A. 9), certiorari denied, 322 U. S. 757.

finality in terms of American law. *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339. That settled, plainly salutary, rule defeats petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 169

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

TERRY I. BLUE,
Petitioner,

vs.

DOUGLAS McKAY, Secretary of the Interior,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY FOR THE PETITIONER TO OPPOSITION OF RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY FOR THE PETITIONER TO OPPOSITION OF RESPONDENT

ERROR IN RESPONDENT'S STATEMENT

In a very short opposition brief Respondent has crowded a substantial number of substantial errors. We reply as follows:

The over-all purpose of the Statute of March 3, 1851 was to implement the Treaty of Guadalupe Hidalgo.

The end in view was to secure from the new Sovereign, in favor of landowners, the same recognition of the same titles which the landowners enjoyed under the former Sovereign. The Act purported to do no more than this. It adopted "confirmation" as the appropriate means to accomplish it. It empowered its officials to do no more than to *confirm*. The words "*to convey*" are not to be found in the Statute. It restricted claims to those deduced from the Spanish or Mexican Government.

Respondent, however, asserts that hidden away in the Statute or implied from an erroneous amplification of the caption is the concealed *grant* of power to United States officials to *convey* to claimants parts of the public domain of the United States never owned by them under the former Sovereign: This is a patent absurdity.

Thus, Respondent seeks to enlarge the legislative grant of the power *to confirm* into the power *to convey* as well and to have it receive judicial approval.

ERRORS IN RESPONDENT'S ARGUMENT

On page 6, Respondent asserts that "The Patent issued pursuant to the decree was in terms of a fee simple grant". *This is not true.* The recitals in the Patent setting forth the confirmatory proceedings use the words "confirm" and "confirmation" throughout.

The land is described and then that particular land is granted to claimants "in the respective shares, and proportion which they hold the premises by title deduced from Cristoval Dominguez . . . " Thus, it becomes necessary to determine what Cristoval Dominguez owned under Mexican law in order to ascertain what was *confirmed.* The *confirmatory* decision and decree show it to be only a Rancho. **No mine or minerals were involved.**

U. S. Patents of Conveyance and of Confirmation are couched in the same general form and phraseology. Respondent implies that there is a difference and that a grant of fee simple title can be deduced from the choice of the form used. This is entrapment pure and simple. The patent wording is the same whether "*confirmation*" or "*conveyance*" is intended.

Construction is to be derived from the stated *purpose* of the patent, not from the archaic words of the common law, which still survive in our forms of conveyance. The many deeds absolute on their face which are construed to be mortgages when such is shown to be their *purpose* illustrate this legal commonplace.

Words out of context from *Brown vs. Brackett,* 21 Wall 387, 22 Law Ed. 622, are next used to show

that the "decree" is "related" to the "claim". Of course there exists a relationship, but Respondent claims an identity. His argument is that the Dominguez claimants used the words "in fee" in the claim and that therefore the words "in fee" must be read into the decision and decree. This involves the absurdity that when the award in the decree conflicts with the "claim", it is the "claim" and not the decision and decree that should prevail.

We should look in the Decision of the Board and in the Decree of the Court affirming it for information as to what was decided. We should not try to stretch or enlarge the decision by reference to inappropriate phraseology found only in the claimant's Petition.

The *judgment* in a case provides the amount of the award, *not* the *prayer* of the *complaint*. The Attorney General either knows this or he does not. If he does not know it, he is lacking in fundamental legal knowledge. The presumption is the other way. Therefore, he owes a duty to the court to call attention to the true rule and not espouse an error which would despoil those whom he, as Trustee, is sworn to protect: i.e., the people of the United States. The only way the Government can win this case is for the attorney-general to lose it. Thus a billion dollars worth of property will revert to its true owners—the United States—just as did the tidelands.

Respondent next quotes and presents as the law two cases which have been criticized and overruled by

a subsequent decision of the Supreme Court: *Beard vs. Federy,* 3 Wall 478, 70 U.S. 174, 18 Law Ed. 88, and *Thompson vs. Los Angeles Farming and Milling Co.,* 180 U.S. 72, 45 Law Ed. 432. They quote the same rule. The latter case is largely a quotation from the former. The rule is that a patent to confirm is "a quitclaim or rather a conveyance" as well as a confirmation.

Boquillas Cattle Co. vs. Curtis, 213 U.S. 339, 53 Law Ed. 822, specifically *disapproves* of *Beard vs. Federy* (supra) and holds to the contrary that the patent issued in a confirmatory proceeding is not a conveyance but rather a "confirmation in the strict sense".

Mr. Justice Holmes in the Boquillas case states "It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant".

Respondent counsel in this case purports to do just what Mr. Justice Holmes held should not be done in the above case.

It is difficult to understand why Respondent quotes the *Boquillas* case (supra) as upholding his contention when it holds the exact opposite.

For the sake of easy comparison of the litigation concerning the *Boquillas* case (supra) and this case, the important features are arranged side by side in parallel columns. Our case will be referred to as Dominguez Grant, the other as Boquillas Grant.

Facts in Boquillas Grant

1. Original title from Mexico
2. Sovereignty cede to U. S.
3. Statutory procedure for confirmation of private titles existing at cession set up
4. Claimants filed claim and secured decree of confirmation
5. Mexican title did not include water rights
6. Water rights vested in U. S. by cession

Patentee Claimed:

Patent of confirmation from U. S. constituted a new source of title to water rights from U. S. to Patentee

Court Decision:

Supreme Court holds "no". Patent is a confirmation only "in the strict sense". Water rights remain in U. S.

Facts in Dominguez Grant

1. Original title from Spain and Mexico
2. Sovereignty cede to U. S.
3. Statutory procedure for confirmation of private titles existing at cession set up
4. Claimants filed claim and received decree of confirmation
5. Mexican title did not include mineral rights
6. Water rights vested in U. S. by cession

Patentee Claimed:

Patent of confirmation from U. S. constituted a new source of title to mineral rights from U. S. to Patentee

Court Decision:

U. S. Court of Appeals holds "yes". Patent is a conveyance by U. S. to patentee of a new title to mineral rights under which mineral rights passed to patentee from the United States

In neither case did the Statute which set up the procedure to *confirm* Mexican titles existing at cession confer on any U. S. official the *power to convey* anything. The sole purpose of the statutes in both instances was *to confirm* old Mexican titles. The Court of appeals enlarged the law.

MOORE vs. SMAW (17 Cal. 199)

Respondent quotes the rather testy observation of the late Mr. Justice Field in *Brown vs. Brackett* (supra) that

> "Every conceivable point respecting these grants, their validity, their extent and the operation of decrees confirming claims of land under them, has been frequently examined and the law upon these subjects has been repeated even to wearisomeness".

This querilous outburst of the author of *Moore vs. Smaw* (17 Cal. 199) is neither decorous nor true. It is unfortunately the assertion of a jurist trying to protect a wrong *State Court* decision made in his youth. He did not point to a single *Federal Court* case which decides the point presented in this case. The Attorney General has pointed to none and has admitted that none existed in his brief on appeal. The decision for which review is sought herein states that no precedent exists, the Court stating in the opinion approved *per curiam* on appeal,

> "While the precise issue raised in this pending suit appears not to have been raised in any prior litigation in any Federal Court so as to be directly passed upon, the *Moore* decision (*Moore vs. Smaw, supra*) has never been questioned and it has been cited with approval in other cases although not with respect to the issue involved in this proceeding".

Thus, California's *Moore vs. Smaw* (*supra*) is the sole case in point presented in the Brief of Respondent and in the Decision which is sought to be reviewed.

The cases from 1861 to 1897 which seek by *dicta* and misuse of legal terms, to uphold the doctrine of *Moore vs. Smaw* (*supra*) were largely written by Mr. Justice Field.

Beard vs. Federy (*supra*).

Brown vs. Brackett (*supra*), both of which are cited by Respondent, are cases in point.

Mr. Justice McKenna's decision in *Thompson vs. L. A. Farming and Milling Co.* (*supra*) is principally a long quotation from *Beard vs. Federy* (*supra*).

Mr. Justice Field protected his *Moore vs. Smaw* (*supra*) case during his long term on the Supreme Court of the United States, lasting as it did for over a third of a century. During that time the reports show that he wrote the opinions in the principal cases involving California Titles and when he did not joint the majority he occasionally wrote *dictum* into concurring opinions in which he sought to implement his old project in California by inserting helpful assertions into the literature of the Supreme Court.

That land frauds in California were matters of common knowledge is shown by the following official activity:

Early in 1858 Attorney General Black addressed a sharp message to the Congress concerning California land frauds and demanded action. He stated:

> "It must be remembered that the grants in most of these fraudulent cases are skillfully got up and were supported by the positive oaths, not merely by obscure men—but also by the testimony of distinguished persons who had occupied high social and political places under the former government". House Ex. Doc. 84, 36th Congress. 1st Session, pp. 31-32.

As a result Congress passed on May 18, 1858

> "An Act for the Prevention and Punishment of Frauds in Land Titles in California". XI Stats. at Large, pp. 290-291.

It is urged by Petitioner that the purported decision in *Moore vs. Smaw* (*supra*) is dictum. Respondent says it is decision and not dictum. This Court should decide this important issue.

Petitioner has examined the Record on Appeal in *Moore vs. Smaw*. Respondent had not done so prior to argument in the Court of Appeal and the statement in the Brief in Opposition that it is "decision" and necessary to the decision in the case impels one to the opinion that no examination of the Record on Appeal has yet been made by Respondent. If so, his statement is the mere assertion of a person uninformed on the subject matter.

The *Moore vs. Smaw* case did not involve title to real estate. It was an action to recover the value of gold bullion of the value of about $400. The judgment was for that amount. Title in fee simple to the land involved was stipulated by both parties to be in the

plaintiff Moore. This fact is ascertainable from the record on appeal in that case. A copy of said stipulation is as follows:

In Dist. Court 15 Jud. Dist.

STATE OF CALIFORNIA,
County of Butte
R. B. Moore, Plaintiff
vs.
John E. Smaw, Defendant

STIPULATION AS TO ADMISSION

In the above entitled cause it is hereby stipulated by and between the parties hereto, that for the purposes of this action, it shall be admitted on part of Deft. that Ptff. is the owner in fee simple of the land set out and described in his said complaint, and on part of Ptff. that Deft. entered upon said land under license from the State of California, and also from the government of the United States, said Deft. contending that such license gave a right to enter and to mine for, and extract gold from said land, which right Ptff. denies.

P. A. McRae, Atty. Ptff.
W. H. Rhodes, Atty. Deft.

Endorsed: In Dist. Court Butte County, Moore vs. Smaw

Stipulation filed April 2, 1860, Wm. Phipps, Clk. by C. G. Lincoln, Depy.

The only question before the court in that damage action was whether a license from the State of California or the General Mining Laws of the United States gave a prospector the right to enter land owned in fee simple by a private party and extract gold. Therefore, the question of how the plaintiff or his predecessors got the fee simple ownership was not necessary for a decision. Mr. Justice Field by a completely volunteer statement injected into the case the discussion as to whether or not a former Patent of Confirmation conveyed the minerals, admittedly owned at that time by the United States, into the case. Regardless of the Judicial morals involved, it resulted in presenting by a pretended decision a statement of law into the literature of the court which, though purely a volunteer dictum, has masqueraded as a decision for over ninety years. The decision complained of herein is based on this dictum which the court below regarded as a decision. Respondent, by observing that it has been in existence for nearly one hundred years, is offering the absurdity that dictum becomes decision by lapse of time. This is directly opposed to the Tideland case which holds that considerations of time, laches and estoppel do not apply when the sovereign's interest is involved. *U. S. vs. California,* 332 U.S. 14, 91 Law Ed. 1889.

Respondent hence asks the court to deny the petition for reasons in conflict with a recent decision of this honorable court. If this is to be done, it should be done openly. This startling change in the decisions of the court should be openly avowed in a hearing and

a written opinion. It should not lurk in the darkness and anonimity of the word "denied" where few, if any, may find it, though it, together with a mere *per curiam* statement, remain a pitfall to entrap the innocent and impair the rights of the uninformed.

The progress of Jurisprudence in the last twenty-five centuries has been away from a *lex non scripta* and toward the greater safety of a written code and toward the protection of the written decisions of our courts, easily found in the reports and the digests and the indices.

U. S. OFFICIALS LACKED THE POWER AND THE JURISDICTION TO CONVEY, UNDER ACT OF MARCH 3, 1851.

The Act of March 3, 1851 limits the jurisdiction of the officials as to person and subject matter in Confirmatory Proceedings. Sec. 8 of said Act limits the claims to be acted upon to

> " . . . persons claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government".

There is no claim here that the title to minerals "derived from the Spanish or Mexican Government". *Moore vs. Smaw* (*supra*), the later decisions of the Supreme Court in relation to titles of confirmation under the Act of 1851 (*supra*), as well as the argument of Respondent all agree that the title to minerals passed from the Mexican Government to the United

States Government by cession, but that the confirmatory patent constitutes "a new source of title to the minerals from the United States to the patentee".

Thus, the "new source of title" was not subject matter with which U. S. officials in Confirmatory proceedings and Patents of Confirmation had jurisdiction to deal. Their jurisdiction was limited to titles derived from the Spanish or Mexican Government. **Thus, the U. S. officials who issued the Patent of Confirmation in this case to the Dominguez heirs belonged, so far as minerals were concerned, to that classification of officials referred to in U. S. vs. California, 332 U.S. 19, as "officers who have no authority at all to dispose of Government property . . . " Such officers, the court goes on to say " . . . cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches or failure to act".**

PUBLIC POLICY vs. LAW

It is admitted that the amount involved in this case is large. It probably exceeds a billion dollars. Petitioner will receive nothing by a victory, save the right to have his application for an oil lease reconsidered in the light of the law declared in this case, and the right and privilege and pleasure of a taxpayer in having restored by this court's decision property to the United States worth a billion dollars. His application (although it ought to be granted) may well be denied again if he wins, but not for the *wrong reason* upon which the present denial is based. The issue, however, of whether the government of the United States owns the minerals under the Dominguez Grant or whether the heirs and assigns of the Dominguez claimants own them is presented to a Federal Court and to this Supreme Court for the first time in history, and presents an important question of law, equal to that of the Tidelands, which has not been, but should be decided by this Honorable Court.

It is understandable that the Attorney General, for reasons of policy, believes that present assumed titles be not disturbed. It is understandable that he so argue before the Supreme Court of the United States, viewed solely as a legal proposition. But why he uses overruled cases and bad logic, and why he refers to a case which holds against him as supporting his position, and why he takes a position opposite to that taken by the Government and decided by this Honorable Court in the Tidelands case (supra) for the purpose of pre-

venting the rights of petitioner and those of the people of the United States from being heard by the highest court in the land is not legally understandable. Viewed solely under the standard of political considerations, all becomes clear. To paraphrase Coke, let politics prevail though the heavens fall.[1] Viewed solely under the standard of legal considerations, the government's course creates an inexplicable perplexity. Its course is not reasonably appropriate for a legal solution of the problem.

The decision of the Court of Appeals is in direct conflict with the decision of this Court in the *Boquillas* case—only there water was involved, here oil is involved.

CONCLUSION

Respondent, while arguing forcefully the question of public policy as to why Petitioner should not ultimately prevail in the Supreme Court of the United States, presents no reasons or cases why Petitioner's rights and those of the People of the United States, which are inexorably joined in this case, should not be heard and determined by this Court on an issue involving the right of ownership by the United States of a billion dollars' worth of oil land.

Certainly a vast economic value is involved.

Certainly the rights of the public are directly concerned.

---

[1] "Fiat Justicia Ruat Coelum". "Let justice be done, though the heavens should fall". 25 C. J. 1086, p. 63.

Certainly the issue has never been decided before this case by any Federal Court.

Certainly the people's rights in this vast property have never been presented to a Federal Court before this case.

Certainly such rights and its important legal questions should be presented and passed upon by the Supreme Court of the United States.

That petitioner should present it, rather than the attorney general, is anomalous. But this Court has before it a question of great importance which it should hear and decide regardless of who presents it. As Justice Jackson once said—the United States always wins, even when it loses. In this case it would upon losing, win a billion dollars worth of property which it rightfully has always owned. This Court has the right and duty to so declare.

The Supreme Court has heretofore taken jurisdiction in similar "land" title disputes to clarify the law thereon. The following constitute examples:

Perfecting title to Missouri grants:

Chouteau v. Eckhart, 2 How (43 U.S.) 344, 11 L. Ed. 293.

French and Spanish grants:

Doe v. Eslava, 9 How (50 U.S.) 421, 13 L. Ed. 200.

Validity of patent for lands:

Bell v. Hearne, 19 How (60 U.S.) 202; 15 L. Ed. 614.

Title to lands:

Berthold v. McDonald & McRee, 22 How (63 U.S.) 334, 16 L. Ed. 318.

Public Land laws:

Sylvester v. Washington, (215 U.S.) 80; 54 L. Ed. 101;

Tidelands case, 332 U.S. 14 (supra).

Petitioner therefore respectfully urges that it is the duty of this Honorable Court to hear and decide the great public questions involved in this case. Construction of both treaty and statutes of the United States are involved. (28 U.S.C. 1257(3).)

Petitioner urges with equal respect that such duty be recognized by granting the Petition for a Writ of Certiorari as prayed for herein.

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